PETITION NOT PRINTED

RESPONSE NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 577

BOB GRANVILLE POINTER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

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Opinions Below

The opinions of the Court of Criminal Appeals of Texas (R. 61; 66) are reported at 375 S.W. 2d 293 (1964).

Jurisdiction

The judgment of the Court of Criminal Appeals of Texas was entered on December 18, 1963 (R. 61); Motion for Rehearing was overruled on February 12, 1964 (R. 66); Petition for Certiorari and Motion for Leave to Appeal *in Forma Pauperis* were filed on March 23, 1964, in this Court and docketed as No. 1207 Misc., subsequently redocketed as No. 10 Misc.; Certiorari and leave to appeal *in forma*

pauperis were granted October 12, 1964. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

This appeal involves the Sixth and Fourteenth Amendments to the Constitution of the United States and Articles 245 to 266, Vernon's Annotated Texas Code of Criminal Procedure. These provisions are reprinted in the Appendix, *infra*.

Question Presented

1. The question presented is limited to the point of law raised in *White* v. *Maryland*, 373 U.S. 59, that is: Is a preliminary hearing a critical stage of a criminal proceeding requiring counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States, if it is at such preliminary hearing that the sole opportunity for cross-examination of the complaining witness is made available by the state?

Statement

Procedural history of the case:

The petitioner was charged with the robbery by assault of Kenneth W. Phillips which occurred on or about the 16th day of June, 1962, in Houston, Harris County, Texas (R. 1). At an examining trial (preliminary hearing) conducted before W. C. Ragan, Justice of the Peace, on or about the 25th day of June, 1962, the State of Texas, represented by an assistant district attorney (R. 14), secured the testimony of the complainant, Kenneth W. Phillips (R. 15), concerning the alleged robbery and Mr. Phillips positively identified petitioner as being the person who had

robbed him (R. 25; State's Ex. 1, R. 55, 56, 57). Petitioner was not represented by counsel at the examining trial (R. 28) and the record is devoid of any cross-examination of Mr. Phillips by the petitioner. The record is further silent concerning any intention by the state of reproducing the testimony adduced at the examining trial at a later date. Nor does the record reflect that petitioner was advised that he could have time to procure counsel and the record does not reveal that petitioner requested counsel to be appointed to represent him.

The testimony adduced of Mr. Phillips (R. 24, 25; State's Ex. 1, R. 55, 56, 57) sufficiently established all the elements of the offense of robbery by assault (Article 1408, Vernon's Annotated Texas Penal Code, reprinted in the Appendix, *infra*) (cf. *Cranford* v. *State*, Tex. Cr. App. 377 S.W. 2d 957 (1964)).

Petitioner was indicted for the offense of robbery by assault (R. 1) on the 16th of July, 1962. On November 6, 1962, the petitioner was put to trial in Criminal District Court of Harris County, Texas, for the offense of robbery by assault (R. 11).

The complaining witness, Kenneth W. Phillips, at the time of trial was in the State of California (R. 12). No showing of diligence on the part of the state to secure the attendance of Mr. Phillips is divulged by the record. The state, over objection of petitioner's trial counsel (R. 12, 14, 15, 16, 21 and 22), was permitted to reproduce the testimony of the complainant through the court reporter who had transcribed the proceedings in Judge W. C. Ragan's Court in the case of *The State of Texas* v. *Bob Granville Pointer* (R. 23, 24 and 25). Counsel objected to the introduction of the examining trial testimony on procedural grounds as well as objecting to the state's failure to secure the attendance of Mr. Phillips on the ground that

such procedure was a denial of the right to be confronted by the witnesses against him (R. 15 and 16).

On the 7th day of November, 1962, petitioner was convicted by a jury of the offense of robbery by assault and sentenced to life imprisonment (R. 58). On January 4, 1963, the petitioner was formally sentenced by the trial court and at that time gave his notice of appeal to the Court of Criminal Appeals of Texas (R. 59 and 60).

In the Court of Criminal Appeals of Texas:

In the original opinion for affirmance of this cause issued by the Hon. Judge Dice on December 18, 1963, the opinion being approved by the Court of Criminal Appeals of Texas, it is stated that petitioner had contended that the reproduction of the testimony and its admission into evidence was a denial of due process to him under the Fourteenth Amendment to the Constitution of the United States. After noting that the examining trial was held prior to the return of the indictment and that there is no provision for appointment of counsel prior to indictment in Texas, Judge Dice held:

> " * * * We have examined the authorities cited by appellant and do not deem them here controlling. In Gideon v. Wainwright, 83 S. Ct. 792, 9 L. Ed. 2d 799, the accused was denied the assistance of counsel at his trial. In Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, and Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, the accuseds did not have the assistance of counsel at the time of their arraignment. In White v. Maryland, 83 S. Ct. 1050, —— L. Ed., the accused was not represented by counsel when he was arraigned at a preliminary hearing and entered a plea of guilty, which was subsequently introduced in evidence against him upon the trial in

which he was convicted. Such are not the facts presented in the instant case" (R. 63).

In the Opinion on Motion for Rehearing issued by the Hon. Judge McDonald, on February 12, 1964, the Court said:

> "Due to appellant's vigorous brief on motion for rehearing, and his reliance on White v. Maryland, 83 S. Ct. 1050, we feel it desirable to further clarify our position in distinguishing the instant case. In the White case it was pointed out that the 'preliminary hearing' under Maryland law was as 'critical' a stage as arraignment under Alabama law, citing Hamilton v. Alabama, 82 Sup. Ct. 159. In the Hamilton case it was stated that under Alabama law arraignment is a critical stage in a criminal proceeding in that, ' • • • the defense of insanity must be pleaded or the opportunity is lost.' Also, 'pleas in abatement must also be made at the time of arraignment,' and further, 'It is then that motions to quash based on systematic exclusion of one race from grand juries, or on the ground that the grand jury was otherwise improperly drawn must be made.'
>
> "The examining trial in Texas is not such a 'critical stage' in criminal proceedings as it is under the holdings above cited and quoted. As originally set forth in our opinion in this cause, 'An examining trial, under Arts. 245 to 266, V.A.C.C.P. is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail" (R. 66).

The petitioner in the Court of Criminal Appeals of Texas consistently and continually contended that this cause was governed by this Honorable Court's decision in *White* v. *Maryland*. The Court of Criminal Appeals of Texas, however, distinguished the case at bar with this Court's de-

cisions in *White, Gideon,* and *Hamilton,* maintaining that since the purpose of examining trials in Texas was to "determine whether the defendant is to be discharged, committed to jail, or admitted to bail" that the examining trial, in Texas, is not a critical stage of a criminal proceeding.

Summary of Argument

We submit that cross-examination of a witness is a right guaranteed to an accused in a criminal proceeding under the Fourteenth Amendment to the Constitution of the United States and that the opportunity for such cross-examination is a "critical stage" of the criminal proceeding requiring the assistance of counsel, and, unless intelligently and understandingly waived by an accused, the introduction into evidence of testimony adduced at a time when the accused did not have the assistance of counsel is a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

This Court in *White* v. *Maryland,* 373 U.S. 59, held:

> "Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case a 'critical' a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel."

Numerous decisions by this Court have pointed to the many "critical" areas in which an accused needed the assistance of counsel to assure him of due process of law as guaranteed by the Fourteenth Amendment to the Con-

stitution of the United States. *Powell* v. *Alabama*, 287 U.S. 45, held that in a capital case that the accused "requires the guiding hand of counsel at every step in the proceedings against him." In *Hudson* v. *North Carolina*, 363 U.S. 697 (Mr. Justice Clark and Mr. Justice Whittaker, dissenting), this Court found "special circumstances" to have existed, requiring counsel, by reason of a plea of guilty of a co-defendant (who was represented by counsel) during the trial. The majority opinion of this Court found that such circumstances "made this a case where the denial of counsel's assistance operated to deprive the defendant of due process of law guaranteed by the Fourteenth Amendment • • • " because of the "prejudicial position in which petitioner found himself when his co-defendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman's ken."

In *Ferguson* v. *Georgia*, 365 U.S. 570, this Court held that Georgia, in implementing the provisions of its incompetency law, could not, consistent with the Fourteenth Amendment, " • • • deny appellant the right to have his counsel question him to elicit his statement." This Court, in *Hamilton* v. *Alabama*, 368 U.S. 52, held that arraignment, under Alabama law, " • • • is a critical stage in a criminal proceeding. It is then that the defense of insanity must be pleaded • • • pleas in abatement must also be made • • • motions to quash based on systematic exclusion of one race from the grand juries • • • or on the ground that the grand jury was otherwise improperly drawn • • • must be made."

In still another context, this Honorable Court in *Carnley* v. *Cochran*, 369 U.S. 506, reversed the conviction when the Court found that " • • • the assistance of counsel might well have materially aided petitioner in coping with several aspects of the case." Among the several "aspects" found to exist which required counsel, this Court pointed out that, "Although both petitioner and his wife testified that they

had experienced disciplinary problems with the children, and thus clearly revealed a possibly significant avenue for impeachment of the children's testimony, there was no cross-examination worthy of the name. We hold that petitioner's case was one in which the assistance of counsel, unless intelligently and understandingly waived by him, was a right guaranteed him by the Fourteenth Amendment."

This Honorable Court vacated and remanded with directions the case of *Walton* v. *Arkansas*, 371 U.S. 29, in which petitioner contended that he was not represented by counsel at the time of his arraignment in the course of which he acknowledged the voluntariness of his confession; such acknowledgment, he contended, was later used against him at the trial in which he was convicted.

The monumental decision of this Honorable Court in *Gideon* v. *Wainwright*, 372 U.S. 335, declared that in all criminal prosecutions an accused has the right to counsel and an indigent defendant has a right to have counsel appointed for him.

In the recent case of this Court of *Massiah* v. *United States*, —— U.S. ——, 84 S. Ct. 1199 (Mr. Justice White, joined by Mr. Justice Clark and Mr. Justice Harlan, dissenting), held that an accused is entitled to representation by counsel at every critical stage of the prosecution, saying:

> "This view no more than reflects a constitutional principle established as long ago as Powell v. Alabama, • • • , where the Court noted that '• • • during perhaps the most critical period of the proceeding • • • that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important, the defendants • • • (are) as much entitled to such aid (of counsel) during that period as at the trial itself.' Id., 287 U.S., at 57, 53 S. Ct. at

59, 77 L. Ed. 158. And since the Spano decision the same basic constitutional principle has been broadly reaffirmed by this Court." (Citing *Hamilton, White, Gideon, supra.*)

Massiah, ibid., was concerned with federal agents surreptitiously obtaining incriminating statements from petitioner after he had retained a lawyer, pleaded not guilty and had been released on bail. The statements so obtained were introduced in evidence against him at the trial in which he was convicted.

Finally, in *White* v. *Maryland,* 373 U.S. 59, this Court found, as previously noted, *supra,* that the "preliminary hearing" in Maryland, in that case, was a critical stage of the criminal proceedings, for a plea was taken from the petitioner at a time he had no counsel and was later introduced into evidence against him at the trial in which he was convicted.

In the case at bar we contend that the examining trial was a critical stage of the criminal proceeding, for it was at this time that the complaining witness was made available to the petitioner for cross-examination purposes and at a time when he had no counsel. This Court in *Alford* v. *United States,* 282 U.S. 687, held that "Cross-examination of a witness is a matter of right." Mr. Justice Stone, speaking for the Court, said:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that

> prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. * * * In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. * * * "

We submit that in this case petitioner's trial counsel was summarily denied, *in limine*, "all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination." *Alford, ibid.* We say that petitioner's trial counsel should have been in a position to cross-examine Mr. Phillips concerning his testimony, to wit, "Well, it was about 11 o'clock and we was closing up and the young one walked in and I thought I recognized him from—we had been robbed on the 27th of May, Sunday Morning, and I thought it was him, but I wasn't for sure, * * *." This was surely a "significant avenue for impeachment" of the testimony, *Carnley* v. *Cochran*, 369 U.S. at 511. Petitioner's trial counsel, in order to impeach the complainant's identification of petitioner, was relegated to the dilemma of admitting positive identification or attempting, with the means at hand, of impeaching the identification by permitting the admission of highly prejudicial testimony concerning an extraneous offense (R. 24; State's Ex. 1, R. 56). We feel that by admitting this testimony, petitioner was not represented by counsel during a portion of the trial upon which he was convicted.

Only the presence of counsel at the examining trial could have explored, by cross-examination of the witness, the possibility of mistaken identification. Only the presence of counsel at the examining trial could have explored the possibility that there was another witness to the robbery

(Mr. Phillips stated that "*we* was closing up * * * " R. 24; State's Ex. 1, R. 56). Only by the "guiding hand of counsel" at the examining trial could petitioner's rights have been safeguarded.

As stated in *Escobedo* v. *Illinois*, —— U.S. ——, 84 S. Ct. 1758 at 1763, in a different context:

> "In Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, we held that every person accused of crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination.' In re Groban, 352 U.S. 330, 334, 77 S. Ct. 510, 519, 1 L. Ed. 2d 376 (Black, J., dissenting). 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. There is nothing that counsel can do for them at trial."' Ex Parte Sullivan, D.C., 107 F. Supp. 514, 517-518."

As we understand the decisions of this Court, there can be no question of waiver of the right to counsel in this case for it is not shown that petitioner intelligently and understandingly waived counsel, *Carnley* v. *Cochran*, 369 U.S. 506, 516. Further, it would be the height of unreason to charge the petitioner with the responsibility of hiring counsel for the examining trial, or asking that counsel be appointed, when the avowed purpose of such examining trials is to determine "whether the defendant is to be discharged, committed to jail, or admitted to bail" (R. 66).

It is not our purpose on this appeal to impose upon the State of Texas the duty of appointing counsel for an accused prior to indictment. However, when, as here, the ex-

amining trial testimony, adduced at a time when the accused does not have counsel, is attempted to be reproduced at the trial on the merits, then, in such event, the accused should be forewarned of the plan of the state to introduce the testimony on the trial of the merits and give the accused an opportunity, prior to the examining trial, to secure counsel. The Rules of Criminal Procedure of Texas (Appendix, *infra*) provide ample means of preserving testimony. In the alternative, the State of Texas can utilize the Uniform Act to Secure Witnesses from Without the State (Appendix, *infra*).

Bound as we are by the record in this case it seems reasonable to conclude that this case is one where the examining trial was a "critical stage of the criminal proceeding" and petitioner was entitled to have the "guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45. We submit that the introduction of the examining trial testimony, in this case, was a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States and that *White* v. *Maryland* governs the disposition of this cause.

Conclusion

For the reasons heretofore stated and so that justice may be done, we pray that this Honorable Court reverse and remand this cause to the Court of Criminal Appeals of Texas.

Respectfully submitted,

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